Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-206

THERMTRON PRODUCTS, INC. (Erroneously sued as Therntron Products, Inc.) and LARRY DEAN NEWHARD .....PETITIONERS

VS:

HON. H. DAVID HERMANSDORFER, JUDGE, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY....RESPONDENT

BRIEF OF JAY LEE LITTLE AND LONA LITTLE IN OPPOSITION

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REASONS WHY THE WRIT SHOULD NOT BE GRANTED

We find no claim that the District Judge has violated any constitutional or fundamental right of Petitioners. Nor is it asserted that Petitioners will not receive a full day in court, with the right to appeal any denial of a fair trial. Petitioners concede a speedy trial in the state court with two able trial judges, perhaps better equipped to try this automobile negligence case involving solely state issues.

We must agree with the District Judge that Diversity

Removal Jurisdiction is a creature of the Congress, and it is thus necessarily subject to Congressional limitations. Here truly the Congress giveth and the Congress taketh away. And these limitations include the limitation on the right to appeal a remand order. 28 USC, section 1447(c) provides for remand and section 14447(d) denies the Circuit Courts of Appeal and this court jurisdiction of an appeal from a remand order. Simply stated, a remand order is not reviewable.

Petitioners seek to circumvent section 1447(d) by the mandamus and/or prohibition route. But Petitioners forget that the Sixth Circuit once sustained their position (109 F. 2d 72) only to have this court reverse in *Kloeb* v. *Armour and Co.*, 311 U.S. 199 (1940), saying at 204:

> "These sections were designed to limit possible review of orders remanding causes and thus prevent delay. *In re Pennsylvania Company*, 137 U.S. 451, 454. They entrust determination concerning such matter to the informal judicial discretion of the district court and cut off review."

To the same effect see *United States* v. *Rice*. 327 U.S. 742 (1945).

The District Judge, in his Response in the Court of Appeals, asserts he acted prudently based upon an "informed judicial discretion". Petitioners say he did not. We attach the Response in the Court of Appeals as an Appendix here. We do not take either position, or even discuss the respective merits. Instead, we say that to do so here would confer the right of appeal, a right expressly denied by the Congress.

The plain fact is the District Judge had jurisdiction to remand. 28 U.S.C. 1447(d). A district judge must exercise his "informed judicial discretion" in many facets of diversity removal. One who elects to remove must do so with the firm realization that the district court has jurisdiction to remand, from which no appeal will lie. And he must accept the denial of appeal, however erroneous the remand. Such is the narrow ambit of removal and remand, a matter of privilege and not of right.

The assertion, as a basis for review, that there exists a conflict in the decisions of the Courts of Appeal simply is not so. By 1940, the Fourth Circuit in *Travelers Protective Association of America* v. *Smith*, 71 F. 2d 511 (1934) and the Sixth Circuit in *Armour and Co.* v. *Kloeb*, 109 F. 2d 72 (1939) had held mandamus would lie where there was clearly no basis for remand. The Third Circuit had squinted in that direction in *Banker's Securities Corp.* v. *Insurance Equities Corp.*, 85 F. 2d 856 (1936), distinguishing on the basis that there the petition for removal had been improvidently denied and no remand had occurred. Thus, there was no diversity among the Courts of Appeals.

In 1940, this court settled the issue in *Kloeb* v. *Armour and Co.*, *supra*, reversing the Sixth Circuit. It was laid to rest in 1946 in *United States* v. *Rice*, *supra*. The Sixth Circuit, in *Stein Stores* v. *Taylor*, 216 F. 2d 439 (1954), was simply executing the mandate of this court in *Kloeb* and *Rice*. Explained, the "conflict between the circuits" quickly dissipates.

The will of the Congress is plain and supreme in this matter. The claim of Petitioners to an absolute right to a

federal forum addresses itself to the Congress and not this court.

CONCLUSION

On November 17, 1972, the Petitioners' tractor-trailer slid on a mountain curve into the automobile operated by Jay Lee Little. He and his wife were injured. Their case was filed in the state court, removed to the district court, lay inactive for a protoracted period with no prospect of trial, and was finally remanded to the state court. It was assigned for trial in October, 1974, but the trial date was vacated because of this Petition. And in Kentucky no interest is recoverable until jugdment, so the Littles continue to lose.

The mandamus proceeding in the Court of Appeals and this Petition have occasioned the very delay the Congress intended to avoid by denying appeal of remand orders.

We suggest this is an adminstrative matter, and it was so considered by the Sixth Circuit. We do not perceive it to be an administrative problem of such magnitude as to require granting a Writ of Certiorari and further delay the Littles in obtaining the justice which seems to be obtainable only in the state courts. The Petition should be denied.

Respectfully submitted,

C. KILMER COMBS
COUNSEL FOR
JAY LEE LITTLE and
LONA LITTLE

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Brief has been served upon the petitioners by mailing same to Hon. Frank G. Dickey, Jr., Landrum, Patterson & Dickey, 201 Security Trust Building, Lexington, Kentucky 40507, counsel for petitioners, and upon H. David Hermansdorfer, Respondent, Catlettsburg, Kentucky 41129, by mailing same to him, this 18 day of December, 1974.

C. Kilmer Combs

C. Kilmer Combs

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 74-1410

THERMTRON PRODUCTS, INC.
(erroneously sued as Therntron Products, Inc.)
AND LARRY DEAN NEWHARD, PETITIONERS

VS: RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION

HON. H. DAVID HERMANSDORFER,
UNITED STATES DISTRICT JUDGE FOR
THE EASTERN DISTRICT OF
KENTUCKY RESPONDENT

Mandamus does not lie to review an order remanding a case to the State Court. 28 U.S.C. 1447(d); *U.S.* v. *Rice*, 327 U.S. 742, 751 (1946); *In Re Pennsylvania Co.*, 137 U.S. 451 (1890). The statutory limitation, "An order remanding . . is not reviewable on appeal or otherwise . . .", of 28 U.S.C. 1447(d) has been construed by this Circuit to exclude Mandamus. *Stein's Stores* v. *Taylor*, 216 F. 2d 439 (6th Cir. 1954).

Although petitioners have expertly set out their contentions, exception is taken specifically to the conclusion respondent had no discretion in the matter. The language of 28 U.S.C. 1447(c) states, in part:

> "(c) If at any time before final judgment it appears that the case was removed improvidently and without

jurisdiction, the district court shall remand the case . . . ."

The clause "was removed improvidently and without jurisdiction" is a logical non-sequitur if the word "and" is read as a conjunctive. If the court has no jurisdiction, all other considerations are irrelevant. Only when read as a disjunctive can the word "and" be construed to give meaning to all of the statutory language. The adverb "improvidently" by definition involves a judgment as to the action taken and, at law, the making of such judgments is denominated as judicial discretion. Although petitioners denominate removal a as right[1], it was noted in *Shamrock Oil Corp.* v. *Sheets*, 313 U.S. 100, 106 (1940) by footnote 2 that it was considered a privilege by the House Committee. H. Rept. No. 1078, 49th Cong., 1st Sess., p. 1. The case of *In re La Providencia Development Corporation*, 406 F. 2d 251. 252 (1st Cir. 1969) found removal to be a privilege.

In any event, only under the most dire circumstances should discretion be exercised to deny a federal forum on removal be it a limited right or privelege.

It is believed, notwithstanding the construction of 28 U.S.C. 1447(d), that a further statement of the issue should be made.

Disclaimer is made of any intent to reduce the numerical case load of respondent. The intent motivating

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1. Where concurrent state and federal jurisdiction exist by Act of Congress, removal as a matter of right exists and discretion does not exist. However, this proceeding does not invoke concurrent jurisdiction but arises under 28 U.S.C. 1332. Cf. **Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 244-245 (1970)**

the Show Cause procedure was to afford civil litigants a trial in an appropriate forum. There is no foreseeable trial time available for civil jury cases on the calendars of respondent's several divisions. The decision to remand involved a consideration of the following factors.

At the time the docket analysis was made of the civil cases hopelessly awaiting trial, respondent had concluded the performance analysis for his courts for the calendar year 1973, these figures showed, in summary:

Cases pending 1/1/73 575
Final orders entered during 1973 594
Cases pending 12/31/73 557

The illness of the Chief Judge of the Eastern District of Kentucky necessitated respondent assuming for an indefinite period the criminal side of the London Division which carried, at the time the planning decision was made, in excess of sixty-five (65) criminal matters. Further, among the pending matters for which respondent is chargeable are five (5) protracted cases. Three (3) of these cases had previously been brought to the attention of the Hon. Harry Phillips, Chief Judge, Sixth Circuit Court of Appeals by letter dated January 11, 1974, who promptly brought them to the attention of the Intercircuit Assignment Committee. To date respondent has not been advised of any affirmative action. A significant planning factor was the projection of Justice Departments Attorneys that four thousand (4,000) Black Lung claims arising under Part B of the Coal Mine Health and Safety Act, 30 U.S.C. 901, had been rejected at the administrative level and were expected to be filed in the Eastern District of

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Kentucky seeking judicial review; and almost four hundred (400) Part A safety violations, civil, were in the United States Attorney's office at Lexington, Kentucky for filing. The Black Lung cases are deemed to be within the priority directive of *Webb* v. *Richardson,* 472 F. 2d 529, 538 (6th Cir. 1972). Finally, inquiry established that the Pike County Circuit Court has two (2) excellent judges and no back log in excess of one (1) year.

In this context, a case by case analysis was made of pending civil cases. In the group of removal cases those depending on pure diversity, 28 U.S.C. 1332, were identified and on respondent's own motion orders were entered to show cause why the case should not be remanded. In all cases where any suggestion of local prejudice or factual cause was made, the cases were retained.

The instant case is a pure diversity case for personal injuries, pain and suffering arising out of an automobile accident. No permanent injury is alleged or is any impairment of the ability to earn money involved. The defendants responded on the basis of right to have their case tried in the United States District Court at Pikeville.

Under any circumstances except the most chronic, the radical procedure invoked in this instance would not have been considered. It is the respondent's belief that a trial judge has an affirmative duty to exercise discretion in the management of dockets in basic fairness to the litigants. There is no doubt merit in defendants' argument of being in federal court as a matter of right, but that does not outweigh the plaintiffs' right to have a reasonably timely trial. The practice in the Eastern District of Kentucky

since about 1968 has been for defendants, excluding, of course, petitioners in this matter, to remove cases from State Court in the perfect assurance that no trial time would be available in the forseeable future. There is no residual fairness in this practice. Accordingly, and with cases of superior priority pending, respondent has undertaken since January 1974 to give relief to the civil docket. The consequence predictably has been an accumulation of criminal matters which no longer may be deferred. At this writing respondent has pending one hundred and forty four (144) criminal cases which have been culled for pleas. Considering that the Eastern District of Kentucky has the sixth highest weighted filing per judge in the United States in criminal cases, the conclusion is made that for the foreseeable future measured in years, not months, there will be no available jury trial time for non-priority civil cases.

Respondent respectfully declines to request any specific relief under the circumstances.

This the 18th day of April, 1974.

/s/ H. David Hermansdorfer
United States District Judge
Eastern District of Kentucky

RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Response to Petition for Writ of Mandamus has been served upon the petitioners by mailing same to Hon. Frank G. Dickey, Jr., Landrum, Patterson & Dickey, 201 Security Trust Building, Lexington, Kentucky 40507, counsel for petitioners, and upon the plaintiffs, Jay Lee Little and Lona Little by mailing same to Kelsey E. Friend Law Firm, 205 Pauley Building, Pikeville, Kentucky 41501, counsel for plaintiffs, this 18th day of April, 1974.

/s/ H. David Hermansdorfer

RESPONDENT